was driving at night, at about 8.15pm. At the most he could only see what was being illuminated by his lorry lights. He was driving a lorry carrying logs placed behind the driver's cabin. It can safely be inferred that with a front wheel off, certainly he could not steer the lorry. If the lorry had hit the hill on the side of the road and the lorry came to a sudden stop, the chances of the logs sliding on his back and crushing him to death were very great. He had to take his chances to save his life. There was no evidence that he jumped out of the lorry. The strong inference is that he did so since his body was found a short distance away from where the lorry had come to a stop. The fact is that the deceased cannot be blamed for doing what he did, or did not do, in the agony of the moment: *Govinda Raju & Anor* v *Laws*,[5] where it was held that what was done or omitted to be done by the plaintiff in the agony of the moment cannot be fairly treated as negligence and therefore there was no contributory negligence on the part of the plaintiff.

As regards quantum of damages, the funeral expenses had been agreed to at $2,000. On the evidence I find that the deceased was earning an average of $800 per month. He took meals in the house whenever he was not in the jungle loading logs on his lorry, when he had to sleep there overnight. His wife's (PW3) evidence shows that he needed about $300 to $400 per month for his own expenses. He used to give his wife for household expenses between $400 to $500 per month. PW4, deceased's fellow driver with five children, used to give his wife for household expenses between $300 to $700 per month. I would assess that the deceased's contribution to his wife and family per month be $450. Pre-trial loss of dependency between date of death of deceased to date of trial is 65 months x $450 = $29,250. Deceased was 42 years old when he died on 17 June 1983. I would give five years multiplier (55 - 47 x 2/3) and on the annuity table this gives $23,380 as future loss of dependency. Interests at 4% pa from the date of accident to date of trial on the funeral expenses of $2,000 and on pre-trial loss of dependency of $29,250. Costs to the plaintiffs.

Order accordingly.

Solicitors: *E Ramasamy & Co*; *Vohrah & Tan Chee Lan.*

Reported by *PS Ranjan*

Standard Chartered Bank v YD Edward Esnen & Ors

HIGH COURT (KUCHING) – CIVIL APPEAL NO KG 6 OF 1988
HAIDAR J
17 MARCH 1989

Civil Procedure – Claim for interest as contracted by the parties – Whether covenant to pay interest merged in judgement – Subordinate Courts Act 1948, s 99A – Subordinate Courts Rules Act 1955, s 4(g) – Subordinate Courts Rules 1980, O 29 r 12

Banking – Guarantees – Covenant to pay interest – Whether independent or ancillary covenant

The appellant's action against the respondents was founded on guarantees made by them jointly and severally in consideration of the appellant granting or continuing banking facilities to a particular company up to the extent of $125,000. The only issue in the appeal was whether the appellant was entitled to claim for 14% pa interest from the date of judgment to realization as contracted or 8% pa as allowed by the court pursuant to O 29 r 12 of the Subordinate Court Rules 1980.

Held, allowing the appeal:

It is a matter of construction of the document whether a covenant to pay interest is an independent covenant or merely ancillary. On the true construction of the guarantee, the covenant to pay interest is an independent covenant and does not merge in a judgment. As such the appellant is entitled to claim for interest at the rate of 14% pa for the post-judgment period.

Cases referred to

1 *Malayan United Bank Bhd* v *Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 (folld)
2 *Supreme Finance (M) Bhd* v *Koo Sin Ken* [1987] 1 MLJ 374 (distd)
3 *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (distd)
4 *American International Assurance Co Ltd* v *Union Builders (M) Sdn Bhd* [1973] 1 MLJ 95 (refd)
5 *MBF Finance Berhad* v *Malaysia Air Charter Company Sdn Bhd & 4 Ors* [1987] 2 MLJ 718 (folld)
6 *Malaysian Building Society Bhd* v *Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (folld)
7 *Popple* v *Sylvester* (1883) 22 Ch D 98 (refd)
8 *Re Sneyd, ex p Fewings* (1884) 25 Ch D 338 (CA) (refd)
9 *Lowry* v *Williams* [1895] 1 IR 274 (CA) (refd)
10 *London Borough of Ealing* v *El Isaac & Anor* [1980] 2 All ER 548 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 16(i), 25
High Court Rules 1980 O 42 r 12
Subordinate Courts Act 1948 s 99A, Third Schedule para 21
Subordinate Courts Rules Act 1955 s 4(g)
Subordinate Courts Rules 1980 O 29 r 12

Phang (Miss) for the appellant.
KH Tang for the first and second respondents.
TO Tan for the third, fourth and fifth respondents.

Cur Adv Vult

Haidar J: This is an appeal by Standard Chartered Bank, the appellant, against the judgment of the learned

Sessions Court judge in so far as the order of the learned Sessions Court judge in allowing the appellant who is the plaintiff before him, to claim only interest at the rate of 8% per annum from the date of judgment to realization. At the outset of the hearing of this appeal I intimated to the counsel that there is nothing in the record of appeal to show that this issue was argued before the learned Sessions Court judge. I was informed that the learned Sessions Court judge, even though he allowed the appellant's application for judgment as prayed in which case the interest rate of 14% as contracted between the parties would have been applicable, however, amended the draft order submitted for approval for the interest after judgment to read 8% per annum. This came about by way of correspondence between the court and the counsel. I was advised by counsel for both parties that since the order has not been perfected yet the Sessions Court was entitled to amend its order. Hence the issue of interest was not dealt with by the learned Sessions Court judge in his written judgment. I let the matter rest there and proceeded to hear the appeal.

The only issue for determination in this appeal hinges on whether the appellant is entitled to claim for 14% from date of judgment to realization as contracted by both parties or 8% as allowed by the court pursuant to O 29 r 12 of the Subordinate Courts Rules 1980 (PU(A) 328/80). Order 29 r 12 reads:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum, or at such other rate not exceeding the rate aforesaid as the court shall direct, such interest to be calculated from the date of judgment until the judgment is satisfied.

Order 29 r 12 was made by the Rules Committee under s 4(g) of the Subordinate Courts Rules Act 1955 (Revised – 1971). Section 4(g) reads:

> ... for regulating the rate of interest recoverable on debts, including judgment debts, or on the sums found due on taking accounts between parties:
>
> Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties;

Section 99A of the Subordinate Courts Act 1948 (Revised – 1972) provides further powers and jurisdiction of the Subordinate Courts. Section 99A reads:

> In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrate's Court shall have the further powers and jurisdiction set out in the Third Schedule.

In so far as it relates to the additional powers of the Subordinate Courts in respect of interest, para 21 in the Third Schedule states:

> 21 Power to direct interest to be paid on debts, including judgment debts or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court.

By comparison to the laws pertaining to High Courts in respect of interest, it would appear that the wordings in O 29 r 12 of the Subordinate Courts Rules 1980, s 4(g) of the Subordinate Courts Rules Act 1955 and s 99A of the Subordinate Courts Act 1948 and para 21 in the Third Schedule thereof regarding the Subordinate Courts' jurisdiction are substantially the same as those in O 42 r 12 (the old rules) of the High Court Rules 1980, s 16(i) and 25 of the Courts of Judicature Act 1964 and para 7 of the Schedule thereof of the High Courts' jurisdiction. However, O 42 r 12 of the High Court Rules 1980 has since been amended and Zakaria Yatim J commented in the case of *Malayan United Bank Bhd* v *Mohammed Salleh bin Mohammed Yusoff & Ors*[1] at p 167:

> The above rule (the old rule) was amended last year and came into force on 12 December 1986 (the new rule). With effect from 12 December 1986, a plaintiff may claim interest from the date of judgment until the judgment is satisfied at a rate agreed upon between the parties even though such interest rate is more than 8% pa...

Order 42 r 12 of the Rules of the High Court 1980 was amended vide PU(A) 445/86. A similar amendment is not made to O 29 r 12 of the Subordinate Courts Rules 1980 and had it been amended accordingly in line with the new O 42 r 12 of the Rules of the High Court 1980, this issue perhaps will not be before me. Be that as it may, in view of the similar provisions of the laws pertaining to the Subordinate Courts and the High Courts the cases cited by learned counsel need to be looked into in considering the issue raised in this appeal before me.

The action against the respondents is founded on guarantees made by them jointly and severally in consideration of the appellant granting or continuing banking facilities or other accommodation for as long as the appellant may think fit to Veneer Wood Sdn Bhd up to the extent of $125,000. As the action is founded on a guarantee agreement, I am of the view that the cases of *Supreme Finance (M) Bhd* v *Koo Sin Ken*[2] and *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd*[3] are not applicable and relevant here as these cases relate to actions founded on charged lands and as such according to Seah SCJ at p 258 in the case of *Malaysian International Merchant Bankers Bhd*[3] there was no judgment debt and hence O 42 r 12 (the old rule) does not apply. In the said case Seah SCJ also discussed *Supreme Finance (M) Bhd*[2] and by implication restored the judgment of the Federal Court in *American International Assurance Co Ltd* v *Union Builders (M) Sdn Bhd*[4] which was not followed by the Supreme Court in the case of *Supreme Finance (M) Bhd*.[2] In the case of *MBF Finance Berhad* v *Malaysia Air Charter Company Sdn Bhd & 4 Ors*[5] the action was founded on the equipment lease agreement. In the said case, Seah SCJ said at p 296:

> We like to point out that a distinction appears to have been made by the legislature between 'debts' (before judgment) and 'judgment debts' (after judgment including default judgment). This division must be borne in mind when the court or judge is dealing with an application for interest exceeding 8% per annum on the judgment debt.

It is then a matter of construction of the document, that is, the guarantee, as to whether to pay interest is an independent covenant or merely an ancillary covenant. According to learned counsel for the first and second respondents, Mr KH Tang, it would appear that the covenant is an independent covenant. His submission was adopted by learned counsel for the third, fourth and fifth respondents, Mr TO Tan.

Edgar Joseph Jr J in the case of *Malaysian Building Society Bhd* v *Lim Kheng Kim & Ors*[6] dealt with at length the issue of interest in respect of the post-judgment period having regard to the provisions of O 42 r 12 of the Rules of the High Court 1980 (the old rule). In the said case the action was founded on a guarantee and learned counsel for the first defendant submitted before Edgar Joseph Jr J that it was not legally permissible for the plaintiff to recover judgment for interest at the contractual rate in respect of the post-judgment period. Edgar Joseph Jr J at p 179 said:

> A survey of the relevant cases on this issue shows that where the covenant for the payment of interest is not merely ancillary, but is an independent covenant, it is not extinguished in the judgment, the doctrine of merger being inapplicable, and the excess interest is recoverable in personal proceedings.

His Lordship went on to discuss the cases of *Popple* v *Sylvester*,[7] *Re Sneyd, ex p Fewings*,[8] and *Lowry* v *Williams*.[9] Reliance was placed by his Lordship on *London Borough of Ealing* v *El Issac & Anor*[10] where Templeman LJ said:

> I do not for myself understand how a debt payable with interest until actual repayment can be merged in a judgment without interest or with a different rate of interest payable thereafter. The merger doctrine, which was upheld by this court in *Re Sneyd* (1883) 25 Ch D 338, may be due to the fact that, in former ages, high rates of interest marked the progress of the individual on the path to perdition; whereas, in this day and age, high interest rates mark the road towards national prosperity.
>
> Merger does not apply where there is an independent covenant nor does it apply to a security.

His Lordship went on further at p 175 to quote the passages taken from *Fisher and Lightwood's Law of Mortgages* (8th Ed) pp 531 and 532 which seem to fortify what Templeman LJ (as he then was) said.

It is thus clear, in my view, that in proceedings in which the mortgagee's claim is against the property, the full interest recovered by the mortgage is recoverable whether the interest covenanted is independent or ancillary and the Supreme Court in the case of *Malaysian International Merchant Bankers Bhd*[3] would seem to use this principle in allowing the interest to be at the rate agreed to between the parties. Of course, it is now well settled that by virtue of the amended O 42 r 12 of the Rules of the High Court 1980 a claim exceeding 8% can be made for the post-judgment period if agreed upon between the parties.

According to p 45 of the record of appeal pertaining to the guarantee agreement, cl 1 states 'as well after as before any judgment at the rate... demand by the bank until payment' regarding the interest payment. On the true construction of the document I hold the view that the covenant is an independent covenant as rightly intimated by Mr KH Tang and as such the appellant is entitled to claim for interest at the rate of 14% for the post-judgment period and I would accordingly allow the appeal by deleting that part of the order of the learned Sessions Court judge for interest at 8% per annum (see p 62 of the appeal record) and substitute it with 14% per annum till date of full and final settlement. There will be no order as to costs of this appeal as agreed to by both parties. Finally it is perhaps now opportune for the appropriate authority, if I may so suggest, to consider amendment of O 29 r 12 of the Subordinate Courts Rules 1980 in line with the amended O 42 r 12 of the Rules of the High Court 1980 so that the issue of interest agreed upon between the parties may be resolved once and for all.

Appeal allowed.

Solicitors: *Reddi & Co*; *Tang Teng & Partners*; *Tan & Yap*.

Reported by *Yap Shao Sin*